



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 9, 2004

Mr. Scott A. Kelly
Deputy General Counsel
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2004-0966

Dear Mr. Kelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195999.

The Texas A&M University System (the "system") received a request for information pertaining to a research project conducted by Dr. B. Don Russell, director of the Smoke Detector Testing Facility of the Texas Engineering Experiment Station at Texas A&M University. In particular, the requestor asks for the following information:

1. Any contract(s) relating to expert testimony B. Don Russell has given in the past ten years;
2. Any deposition given by B. Don Russell in past 10 years;
3. All correspondence and documents prepared by Larry Grosse or B. Don Russell and/or Texas A&M University concerning the protocol for testing MasterGuard products;
4. All specifications on the type, make and model of the smoke chamber used to test the MasterGuard unit

5. All information concerning the obscuration and calibration of the MasterGuard unit tested by B. Don Russell and all of the other smoke detectors used when the MasterGuard smoke detector was tested;
6. A copy of all formal and informal opinions B. Don Russell has given concerning price and/or quality of fire protection products.

You state that there are no documents responsive to items 1, 2, and 4 of the request. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.–San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You claim that the remainder of the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.–Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.–Houston [1st Dist.] 1984, writ refused n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). In this case, to determine whether the system has met its burden of establishing that litigation is reasonably anticipated, we must first address the requestor's statement that the requestor's client does not contemplate litigation against the system or any of its components. In comments submitted to this office, the requestor states that he represents MasterGuard in the matter of a Rule 202 Petition to Investigate Claim against Dr. Russell in his individual capacity only. Thus, the requestor indicates that any claims asserted by MasterGuard against Dr. Russell do not involve the system, and therefore contends that the system has not met its burden of establishing that litigation against the system is reasonably anticipated. We further note, however, that the system contends that litigation is anticipated against Dr. Russell as a consequence of his employment with Texas A&M University and his position as director of the Smoke Detector Testing Facility of the Texas Engineering Experiment Station. The system informs us that the dispute at issue relates to research activities conducted by Dr. Russell in his official capacity and in the scope of his regular duties. Furthermore, the system informs us that the system has requested and received representation by the Office of the Attorney General in this matter.

Based on the system's representations and our review of the submitted information, we find that the system has established that any potential litigation against Dr. Russell concerning the matter at issue constitutes "litigation . . . to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party" for purposes of section 552.103. *See* Open Records Decision Nos. 551 at 5 (1990), 511 at 3 (1988) (attorney for governmental body has discretion to determine whether to claim litigation exception, subject to review by attorney general). Accordingly, we determine that the system may claim section 552.103 as an exception to disclosure for the information at issue. We must therefore consider whether the system has provided concrete evidence to establish that litigation is reasonably anticipated in this case.

Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this instance you state, and submit documentation showing, that the requestor has made a specific demand upon Dr. Russell in his professional capacity and has stated MasterGuard's intent to "pursue all possible means of legal recourse" against Dr. Russell if this demand is not met. Furthermore, we note that MasterGuard has initiated court proceedings to investigate specific legal claims against Dr. Russell, and we find that MasterGuard's filings in connection with the Rule 202 petition demonstrate MasterGuard's intent to file suit if the petition was denied. Based on the system's representations and our review of the submitted information, we determine that the system has provided concrete evidence to establish that litigation concerning the matter at issue was reasonably anticipated at the time the system received the present request for information. Moreover, we find that the information at issue relates to the anticipated litigation. Accordingly, we determine that the system has established that section 552.103 is applicable in this instance.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Here, it is clear from our review of the submitted information that the opposing party has seen or had access to portions of the information. Thus, we determine that any portion of the submitted information that has been provided to or obtained by the opposing party in the anticipated litigation may not be withheld under section 552.103 and must be released. We conclude that the system may withhold the remainder of the information at issue under section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Saldivar', with a long horizontal flourish extending to the right.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 195999

Enc: Submitted documents

c: Mr. David J. LaBrec
Strasburger & Price, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 75202-3794
(w/o enclosures)